

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DANA SCHMIT,

Claimant,

vs.

TYSON FRESH MEATS, INC.,

Employer,
Self-Insured,

and

SECOND INJURY FUND OF IOWA,

Defendants.

File No. 19007052.01

ARBITRATION DECISION

Head Notes: 1108.50, 1402.40,
1802, 1803, 2502, 2907, 4000

STATEMENT OF THE CASE

Dana Schmit, claimant, filed a petition in arbitration seeking workers' compensation benefits from Tyson Fresh Meats, Inc., self-insured employer, and the Second Injury Fund of Iowa as defendants. Hearing was held on April 27, 2022. This case was scheduled to be an in-person hearing occurring in Des Moines. However, due to the declaration of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via Internet-based video. Accordingly, this case proceeded to a live video hearing with all parties and the court reporter appearing remotely. The video hearing started on CourtCall but due to technical difficulties, the hearing was moved to the Zoom platform.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, as amended pursuant to the hearing transcript, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

Dana Schmit was the only witness to testify live at trial. The evidentiary record also includes joint exhibits 1-9, claimant's exhibits 1-9, and defendant's exhibits A-H. All exhibits were received without objection. The evidentiary record closed at the conclusion of the arbitration hearing.

The parties submitted post-hearing briefs on May 27, 2022, at which time the case was fully submitted to the undersigned.

ISSUES

The parties submitted the following issues for resolution:

1. The nature and extend of permanent partial disability claimant sustained, including whether claimant is entitled to any benefits from the Second Injury Fund of Iowa.
2. Claimant's average weekly wages at the time of the injury.
3. Whether penalty benefits are appropriate.
4. Whether claimant is entitled to reimbursement for an independent medical examination pursuant to Iowa Code section 85.39.
5. Whether an assessment of costs against the defendant is appropriate.

FINDINGS OF FACT

The undersigned, having considered all the evidence and testimony in the record, finds:

Claimant, Dana Schmit, was employed at Tyson Fresh Meats, Inc. ("Tyson") on June 3, 2019 when he sustained a work-related injury. Mr. Schmit was hired by Tyson in March 2002 as a livestock handler. Mr. Schmit alleges injuries to his left upper extremity, left shoulder, and head as the result of the June 3, 2019 work injury.

It should be noted that Mr. Schmit had a prior workers' compensation claim against Tyson. He alleged a cumulative injury to his bilateral upper extremities. He had bilateral carpal tunnel which resulted in surgery. He continued to have symptoms in his upper extremities even after surgery. Mr. Schmit and Tyson entered into an Agreement for Settlement on this claim. The settlement was approved by this agency on March 13, 2018. (Hearing Transcript pages 14-15, 30-33, 42; Claimant's Exhibit, 1, pages 37, 48-50; Cl. Ex. 8; Defendant's Exhibit A, pages 4-5)

We now turn back to the case at bar. On June 3, 2019, Mr. Schmit was performing his duties as a livestock handler when an approximately 370-pound boar approached him from behind and went between his legs. Mr. Schmit was flipped over backwards and landed on his left side, his shoulder, and head. He remembers one bounce on the pig and then the next thing he remembers was laying on the ground on his back. He believes he may have lost consciousness for a short period of time. (Tr. pp. 16-19)

Mr. Schmit was transported to Allen Hospital via ambulance. When the EMTs picked him up to place him on the stretcher his shoulder popped, and he let out a big yell. During his fall Mr. Schmit sustained a laceration to the left side of his head from hitting the cement. During the ambulance ride the EMTs asked Mr. Schmit who his primary care physician was, and he erroneously told him the name of his doctor from over 10 years ago. He recalls his head being "fuzzy" during his time in the emergency

room. The notes from the emergency room note head laceration and traumatic head injury secondary to being struck by a pig. They put 12 staples in his head. Mr. Schmit reported that he did not believe he had loss of consciousness. The physical exam was consistent with head laceration and traumatic head injury. Mr. Schmit was noted to be neurologically intact, and a head CT was not indicated. The impression was: laceration of scalp without foreign body, concussion without loss of consciousness and acute pain of the left shoulder. Mr. Schmit was discharged home. (Tr. pp. 16-19; Joint Exhibit 5; Cl. Ex. 1, p. 38; Cl. Ex. 4)

On June 4, 2019, Mr. Schmit saw Robert L. Gordon, M.D. at Tyson Midwest Occupational Health Associates, a clinic that is onsite at Tyson. The note reflects Mr. Schmit's fall on June 3, 2019, and that he fell to the left side and had incurred a contusion to his left parietal region along with a 5 cm laceration. He also struck his left lateral shoulder region. He reported pain of his left shoulder and difficulty raising his left shoulder to the side or in front. He also had pain of his left parietal region. Dr. Gordon discussed the hog incident with Mr. Schmit and noted there was no reported loss of consciousness. He also noted no issues with memory or cognition. Dr. Gordon's impression was left parietal contusion with associated laceration and left shoulder contusion. Dr. Gordon prescribed Voltaren and an antibiotic. He restricted Mr. Schmit to no lifting greater than 5 pounds with his left upper extremity and no overhead activities with his left upper extremity. He was to return in one week. (JE2, pp. 4-5)

On June 4, 2019, Mr. Schmit signed a form entitled Team Member Statement of Injury/Illness. He stated that he sustained a blow to the head and shoulder when he fell backwards. He injured his head, shoulder, and elbow. (Cl. Ex. 4, p. 73)

Mr. Schmit returned to Dr. Gordon on June 10, 2019 for follow-up of the left parietal contusion and left shoulder contusion. His head was doing well. Since his last visit he noted some numbness/tingling and pain of his left scapular region along with numbness and tingling down his left upper extremity into his left small digit and ring digit. He denied any headaches. After examination, Dr. Gordon's impression was left parietal contusion with associated laceration and left shoulder contusion. Dr. Gordon's impression also included left upper extremity radicular complaints which he did not have at last evaluation, but his symptomology continued to evolve. (JE2, p. 8)

On June 18, 2019, Mr. Schmit returned to Dr. Gordon. He had his staples removed and reported he was doing very well in that region and did not have any pain. He continued to have pain in his left shoulder along with numbness and tingling of his left upper extremity down into his left small and ring digits. All of his symptoms improved with prednisone. (JE2, p. 9)

Mr. Schmit returned to Dr. Gordon on June 25, 2019 for follow-up of the left parietal contusion and left shoulder contusion. He reported that his head was doing well, and he had no pain. He continued to have lateral left shoulder pain. He also continued to note numbness and tingling down his left upper extremity into his left small and ring digits. Dr. Gordon recommended physical therapy and continued work restrictions. Mr. Schmit attended physical therapy at Select Physical Therapy. He was discharged to a home exercise program on June 12, 2020. The left shoulder strength

and range of motion were noted to be full and within normal limits. He had no reports of pain. (JE2, p. 10; JE6; Cl. Ex. 1, pp. 38-39)

Mr. Schmit returned to Dr. Gordon on July 23, 2019 for follow-up of the left parietal contusion and left shoulder contusion. He was on vacation from July 5, 2019 until July 22, 2019. He had some improvement of his left shoulder but did have some popping/grinding of his left shoulder. He also continued to have numbness and tingling of his left ulnar two digits. If he was not utilizing his left shoulder, he did not have as much pain. Dr. Gordon's impressions included: left parietal contusion with laceration, with some decreased sensation in that area; left shoulder contusion with continued symptoms; left upper extremity paresthesias of the ulnar two digits. The doctor prescribed prednisone and physical therapy. He was released to perform his job driving hogs full duty. (JE2, pp. 11-12)

On August 6, 2019 Mr. Schmit reported that his left shoulder was doing notably better and his left hand paresthesias had also been improving. Dr. Gordon recommended continued prescription medications, a home exercise program, and continuing full duty. (JE2, p. 13)

Mr. Schmit returned to Dr. Gordon on September 3, 2019. He had been performing full duty. He had numbness and tingling of his ulnar two digits periodically. Dr. Gordon placed Mr. Schmit at maximum medical improvement (MMI) for his left parietal contusion. He also placed him at MMI for his left shoulder contusion and noted he had full range of motion and strength. Dr. Gordon noted he was also at MMI for his left upper extremity paresthesias of the ulnar two digits with no functional limitation. He discharged Mr. Schmit from his care without any permanent restrictions or impairment. (JE2, pp. 14-15)

On October 1, 2019, Mr. Schmit returned to Dr. Gordon. He continued to have intermittent numbness and tingling of his ulnar two digits. His left shoulder had not improved since his last visit. Dr. Gordon noted that he had full range of motion and full strength of the shoulder. His left upper extremity paresthesia of the ulnar two digits remained the same. He had no functional limitation, and his exam was negative for radiculopathy and peripheral nerve entrapment. Dr. Gordon recommended continued full duty and an MRI of the left shoulder. (JE2, pp. 16-17)

On October 8, 2019, Mr. Schmit returned to Dr. Gordon to review his October 4, 2019 MRI. MRI revealed grade II-III AC joint separation. Dr. Gordon recommended an evaluation by an orthopedic surgeon for his left shoulder. If he did not have improvement of his left hand, he recommended an EDX study. He was released to full duty. (JE2, p. 18; JE7)

Mr. Schmit saw Thomas S. Gorsche, M.D., an orthopedic surgeon on October 14, 2019. He reported numbness/tingling in his fourth and fifth digits in his left hand. Dr. Gorsche reviewed the MRI and noted it showed a high-grade partial articular supraspinatus tendon avulsion (PASTA) lesion, supraspinatus, and a grade 2-3 AC separation. Dr. Gorsche's assessment was left shoulder pain, unspecified chronicity. His impression was to rule out an injury to the ulnar nerve. He recommended an AC

joint injection. Mr. Schmit was to continue regular work and return in three weeks. (JE3, pp. 23-25)

Dr. Gorsche saw Mr. Schmit again on October 24, 2019. Mr. Schmit was unsure if the injection he received helped much. He continued to have shoulder pain. He had nerve conduction studies (NCS) performed which showed the ulnar nerve was normal. Mr. Schmit still had a bit of carpal tunnel on the left side, but his complaints were contained to the fifth and fourth digits. Dr. Gorsche's assessment was left shoulder pain, and shoulder lesion. He recommended left shoulder arthroscopic surgery. (JE3, pp. 26-27; JE8; Cl. Ex. 1, p. 42)

On December 11, 2019, Dr. Gorsche performed a diagnostic arthroscopy debridement of type I labral tear, open rotator cuff repair. (JE9)

After surgery Mr. Schmit continued to follow-up with Dr. Gorsche's office. On February 5, 2020, Mr. Schmit reported that since the June injury he had paresthesias of the fourth and fifth finger on the left. NCS was negative and he did not have any elbow complaints. Dr. Gorsche said there was nothing to do other than to give it more time. He recommended continuing physical therapy. On June 11, 2020, Dr. Gorsche placed Mr. Schmit at MMI. He stated that Mr. Schmit may do regular work duties with no restrictions. (JE3, p. 29; Cl. Ex. 1, pp. 40-42)

At hearing Mr. Schmit testified that he continues to have left shoulder pain when he moves his shoulder certain ways. He also continues to have numbness and tingling in his left pinky and ring finger. He also reports that he has a headache approximately once per week. He usually takes over-the-counter Tylenol, and his headache disappears in approximately an hour. According to Mr. Schmit, his wife has made comments that he seems to forget things sometimes; she did not make these comments prior to his work injury in 2019. He also experiences ringing in his ears. He testified that he continues to have carpal tunnel symptoms including swelling in his right wrist. He has noticed that after his carpal tunnel he is not as strong as he was before he had bilateral carpal tunnel surgery in 2017. (Tr. pp. 24-33)

Permanent Partial Disability

The first issue to be addressed is the amount of permanent impairment Mr. Schmit sustained as the result of the June 3, 2019 work injury. Several physicians have offered their opinions in this case.

Left Shoulder

Mr. Schmit has alleged he sustained permanent impairment to his left shoulder as the result of the June 3, 2019 injury.

On June 21, 2020, Dr. Gorsche stated that Mr. Schmit reached MMI on June 11, 2020. He opined Mr. Schmit sustained 5 percent impairment of the left upper extremity. Dr. Gorsche based his impairment rating on the AMA Guidelines, 5th edition, Figures 16-40, 16-43, and 16-46. (JE3, p. 31)

At the request of his attorney Mr. Schmit saw David Segal, M.D. for an independent medical evaluation on November 13, 2020. After conducting the IME and reviewing the records provided to him Dr. Segal issued a report dated December 21, 2020. Dr. Segal opined that Mr. Schmit had sustained several conditions as the result of the June 3, 2019 work injury. Regarding the left shoulder, Dr. Segal assigned a total of 19 percent whole person impairment as the result of the work injury. In reaching that total he assigned 9 percent impairment of the upper extremity for range of motion, 19 percent of the upper extremity due to motor deficit/strength evaluation, and an additional 3 percent for pain. (Cl. Ex.1 pp. 18-19)

At the request of the defendant, Charles D. Mooney, M.D. conducted an IME. He opined Mr. Schmit's left shoulder condition was consistent with a contusion ultimately identified with a grade 2 AC separation, PASTA lesion and rotator cuff tear. He noted Mr. Schmit was status post rotator cuff repair and labral repair along with acromioplasty. He opined this was related to the June 3, 2019 work injury. Pursuant to the AMA Guides, Dr. Mooney assigned 5 percent impairment of the upper extremity based on range of motion. I find his impairment rating is consistent with the rating of Dr. Gorsche. Dr. Mooney stated,

It is my opinion that it is not appropriate to provide additional impairment related to any loss of strength. This is addressed in the Guide on page 508 first paragraph, noting that "Decreased strength cannot be rated in the presence of decreased motion, painful conditions, deformities, or absence of parts (e.g. thumb amputation) that prevent effective application of maximum force in the region being evaluated."

(Def. Ex. B, p. 19)

On April 11, 2022, Dr. Segal authored a missive to claimant's counsel. He disagreed with Dr. Mooney's opinions and affirmed his own prior opinions. Because Dr. Segal had only seen Mr. Schmit on one occasion and it was in November 2020, Dr. Segal had a Zoom call with Mr. Schmit on April 6, 2022 to review his current complaints. Dr. Segal stated that he tested Mr. Schmit's shoulder range of motion via Zoom. Based on the range of motion Dr. Segal observed, he increased Mr. Schmit's impairment rating for his left shoulder from 19 percent to 20 percent. (Cl. Ex. 1, pp. 55-61)

With regard to the left shoulder, I find the impairment ratings of Dr. Gorsche and Dr. Mooney carry the greatest weight. I further find that both ratings are based solely on The Guides and are consistent with one another. Thus, I find that as the result of the work injury Mr. Schmit sustained 5 percent upper extremity impairment.

Left Ulnar Neuropathy

Mr. Schmit has alleged he sustained permanent impairment due to left ulnar neuropathy as the result of the June 3, 2019 injury. There are several physicians who have offered their opinions regarding diagnosis and impairment of the left upper extremity.

As part of the December 21, 2020, IME Dr. Segal addressed Mr. Schmit's left upper extremity. Dr. Segal diagnosed left ulnar neuropathy. He noted Mr. Schmit has findings on exam that support ulnar neuropathy, dense sensory loss in his ulnar distribution in his left hand, and weakness in his grip and flexor muscles and abductors. He also noted a positive Tinel sign at his elbow. Dr. Segal related this to the June 3, 2019 work injury because he felt Mr. Schmit injured his left elbow on that date. Dr. Segal assigned 23 percent upper extremity impairment as the result of left ulnar neuropathy. His rating was based on decreased grip strength, ulnar muscle weakness, and sensory loss. I find Dr. Segal did not adequately address how the 2017 bilateral carpal tunnel and residual symptoms affected this impairment rating. (Cl. Ex. 1, p. 20) Dr. Segal also does not address the fact that The Guides caution assigning impairment for loss of strength. See AMA Guides, Section 16.8, p. 507.

On June 22, 2021, at the request of his own attorney, claimant underwent an IME with Farid Manshadi, M.D. The IME was conducted in connection with his 2017 work injury. Dr. Manshadi noted that Mr. Schmit developed bilateral carpal tunnel syndrome in the course of his employment with Tyson with an assigned date of injury of April 21, 2017. Dr. Manshadi opined that Mr. Schmit continued to have residuals from the carpal tunnel syndrome from the April 2017 work injury. He felt the symptoms Mr. Schmit was experiencing at the time of the June 2021 examination were the same symptoms he had in April 2017. Dr. Manshadi cited page 495 of The Guides and opined for the left upper extremity, Mr. Schmit had no impairment for the sensory deficit, but on Table 16-11 he fell under Grade 4 and assigned 25 percent motor deficit. He assigned 3 percent impairment of the left upper extremity. For the right upper extremity, he assigned 4 percent impairment of the right upper extremity. (Cl. Ex. 2) Dr. Manshadi, a physician selected by Mr. Schmit's attorney, did not diagnose left ulnar neuropathy.

As part of his March 17, 2022 IME, Dr. Mooney assigned 5 percent impairment of each upper extremity for his bilateral carpal tunnel. Dr. Mooney opined that the evidence of bilateral carpal tunnel syndrome was related to the June 20, 2017 injury. He assigned this impairment pursuant to page 495 of The Guides. He noted that previously Mr. Schmit had 3 percent impairment of the right upper extremity and 2 percent impairment of the left upper extremity. Dr. Mooney did not state that any of the impairment was due to the June 3, 2019 injury. (Def. Ex. B, pp. 16-18) Dr. Mooney did not diagnose left ulnar neuropathy.

In Dr. Segal's April 11, 2022 missive to Mr. Schmit's attorney, Dr. Segal stated he instructed Mr. Schmit via Zoom on how to perform a Tinel test on his left elbow. Dr. Segal does not cite the portion of The Guides that permits self-testing. In his missive Dr. Segal notes that a negative EMG does not preclude a diagnosis of ulnar neuropathy. Dr. Segal supported his statement with citations to an article in "Front Neurol" and the "Archives of physical medicine and rehabilitation." (Cl. Ex. 1, p. 58) In rebutting Dr. Mooney's statement, Dr. Segal does not cite to the AMA Guides.

On April 14, 2022, Dr. Mooney stated he felt it was inappropriate for Dr. Segal to provide an impairment rating for the ulnar neuropathy when there was no objective testing confirming the condition. (Def. Ex. H, p. 1) Dr. Mooney does not cite to any specific portion of the AMA Guides.

Regarding permanency and Mr. Schmit's claim of left ulnar neuropathy, I do not find the opinions of Dr. Segal to be persuasive. His opinions are contrary to the opinions of the other physicians in this case and the findings of the EMG examination and nerve conduction studies of Mr. Schmit's left upper extremity wherein the ulnar nerve was normal. (JE8) I find Mr. Schmit failed to demonstrate that he sustained left ulnar neuropathy as the result of the June 3, 2019 work injury. As such, any issue regarding impairment of the left upper extremity is moot.

Head/Brain

Mr. Schmit has alleged a head injury as the result of the June 3, 2019 injury. There is no dispute that he struck his head when he fell on June 3, 2019. He sustained a laceration to his scalp which required 12 staples. The records from the emergency room note head laceration and traumatic head injury. The physical exam was consistent with head laceration, traumatic head injury, and concussion. There was no loss of consciousness. Mr. Schmit was mentally fuzzy immediately after the fall and provided outdated information in the ambulance regarding his personal physician. At hearing he testified that since the injury he has a headache about once a week that is resolved with Tylenol. Additionally, he says his wife has made comments about his memory. However, these symptoms are not found in the treatment records. Mr. Schmit admitted that he never told any of his treating physicians or the physical therapist he saw about headaches, memory loss, or cognitive issues. (Tr. pp. 16-19, 48-50; JE5; Cl. Ex. 1, p. 38; Cl. Ex. 4)

The only time Mr. Schmit reported headaches, memory issues, and ringing in his ears was during his IME with Dr. Segal in late 2020. (Tr. p. 49) Dr. Segal diagnosed Mr. Schmit with a traumatic brain injury, concussion with loss of consciousness and residual post-concussive symptomatology and post-concussive headache. (Cl. Ex. 1, p. 10) The records from the emergency room indicate no loss of consciousness. Dr. Segal believes Mr. Schmit continues to have post-concussive symptomatology. He notes Mr. Schmit states his cognition is a little slower than prior to the injury. He also reports his short-term memory is a little off. Mr. Schmit reports ringing in his ears and dizziness which is new since the injury. Additionally, he has a headache approximately once a week which is resolved with Tylenol. In his IME report Dr. Segal listed twelve different potential evaluations or treatments for Mr. Schmit's post-concussive symptoms/post-traumatic headache. (Cl. Ex. 1, pp. 24-25) Although Dr. Segal's report was issued back in December 2020, there is no indication in the record that Mr. Schmit has ever requested or sought out any of these twelve different options listed by the doctor he selected.

In Dr. Mooney's March 17, 2022 report part of his assessment of Mr. Schmit is "[l]eft parietal contusion with laceration without evidence of significant concussive findings post injury. The medical records do not indicate that he had any significant complaints related to his head trauma, and that his wound healed, and he had no further sequelae." (Def. Ex. B, p. 16) He opined that a diagnosis of a concussion was not appropriate because he did not demonstrate any evidence of post-concussive syndrome during his post-injury treatment. (Def. Ex. B, p. 17) Dr. Mooney stated that Mr. Schmit did not have any evidence of permanent partial impairment. He opined that

“any complaints of cognitive dysfunction cannot be assessed on this evaluation and would require neuropsychological evaluation which in my opinion is not indicated.” (Def. Ex. B, p. 19)

Dr. Segal authored a missive on April 11, 2022 after he had the opportunity to review Dr. Mooney’s IME report. He disagrees with Dr. Mooney and affirms his opinions as stated in his prior IME and addendum. He set forth his criticisms of Dr. Mooney’s opinions. Dr. Segal reported that Mr. Schmit has no recollection of Dr. Mooney ever asking him about cognitive process, memory, or balance issues. (Cl. Ex.1, pp. 55-61)

On April 14, 2022, Dr. Mooney authored a missive to defense counsel. He had been provided Dr. Segal’s April 11, 2022 letter. He disagreed with Dr. Segal’s opinions and affirmed his own prior opinions. Additionally, Dr. Mooney pointed out that Mr. Schmit’s post-concussive complaints were not identified on his exam even though Mr. Schmit was given numerous opportunities to discuss any symptoms related to the work injury, including his minor head trauma. Additionally, Dr. Mooney reaffirmed that he believes it is inappropriate to provide any impairment regarding cognitive function without neuropsychological testing. (Def. Ex. H, pp. 1-2)

There is no question Mr. Schmit fell and struck his head. However, there are questions as to whether the fall caused any permanent impairment. Although Dr. Segal provided a lengthy report, I find Mr. Schmit has not demonstrated that was a cause of permanent disability as it relates to his head/cognitive issues. Regarding Mr. Schmit’s head injury, I do not find the opinions of Dr. Segal to be persuasive. Despite ample opportunities, Mr. Schmit did not report, nor did he receive treatment for headaches, memory problems, or cognitive difficulties after the June 3, 2019 work injury. Even after Dr. Segal’s report in 2020 Mr. Schmit did not request any treatment. Based on the absence of complaints or treatment related to any post-concussive symptoms, I find Dr. Segal’s opinions are not persuasive. I find the opinions of Dr. Mooney to be more persuasive on this issue. Thus, I find claimant did not sustain any permanent disability with respect to his head injury from the work accident.

Therefore, I find that Mr. Schmit has failed to demonstrate that he sustained any permanent injury beyond his left shoulder. I find that as the result of the June 3, 2019 work injury Mr. Schmit sustained a total of 5 percent upper extremity impairment.

SIF

Mr. Schmit has also made a claim against the SIF in this case. He has alleged, and the SIF stipulates, that the first qualifying injury is on April 21, 2017 to his bilateral arms. (Hearing Report) He alleges that the second qualifying date of injury is June 3, 2019. Based on the above findings of fact, I find the June 3, 2019 injury only resulted in permanent disability to his left shoulder. I further find that the left shoulder is not an enumerated scheduled member under Iowa Code section 85.64.

AWW

The parties disagree on which weeks should be included in the calculation of Mr. Schmit's average weekly wages. During the period in question Mr. Schmit's hourly rate was \$19.83. The parties submitted payroll records for the claimant. (Cl. Ex. 6, pp. 77-91)

Claimant set forth his rate calculation in his exhibit 6, page 76 and contends his average weekly wage is \$866.94. Claimant contends certain weeks should be excluded from the rate calculation because he worked fewer than 40 hours during those weeks. Defendant contends it is permissible to include weeks in which claimant worked fewer than 40 hours because they are representative of his customary earnings. Defendant set forth its rate calculation in their exhibit E and contends Mr. Schmit's average weekly wage is \$802.98. In their calculation defendant excludes the weeks ending June 1, 2019 and February 23, 2019. Defendant provides no explanation for these exclusions.

Mr. Schmit was scheduled to work 40 hours per week. If there were weeks that he worked less than 40 hours, it was because he had to leave early for something like a dentist appointment. (Tr. p. 14) I find that Mr. Schmit was a full-time employee who was regularly scheduled to work 40 hours per week. I find the weeks included in claimant's average weekly wage calculation are representative of his customary earnings. Thus, I find claimant's average weekly wages at the time of the injury was eight hundred sixty-six and 95/100 dollars (\$866.95).

Penalty

Mr. Schmit asserts penalty benefits are appropriate in this case because Tyson failed to perform an ongoing investigation into permanency of Mr. Schmit's alleged ulnar neuropathy and mild traumatic brain injury. Based on the above findings of fact, I found Mr. Schmit failed to prove he sustained any permanency beyond his left shoulder. Therefore, claimant has also failed to prove that the defendant unreasonably delayed or denied any permanency benefits related to Mr. Schmit's alleged ulnar neuropathy and mild traumatic brain injury.

Claimant also asserts a penalty claim for defendant's failure to pay healing period benefits from December 11, 2019 through December 14, 2019. Mr. Schmit was off work starting with his surgery on December 11, 2019 and for some time thereafter. According to the payment logs, Tyson did not pay any healing period benefits from December 11, 2019 through December 14, 2019. Healing period benefits began on December 15, 2019. (Def. Ex. D) Claimant's entitlement to these healing period benefits is not in dispute. At the start of the hearing defendant stipulated that if defendant was liable for the work injury, then claimant is entitled to healing period benefits during this time period. (Tr. pp. 4-5) Claimant seeks penalty because Tyson failed to convey a basis for why these benefits were not timely paid. I find that defendant did not pay any healing period benefits from December 11, 2019 through December 14, 2019. I further find the record is void of any evidence to demonstrate the defendant conveyed its basis to the claimant for the denial or delay of benefits. I find defendant unreasonably delayed payment of healing period benefits during this time

and therefore penalty benefits are appropriate. I find a penalty in the amount of one hundred and no/100 dollars (\$100.00) is appropriate.

85.39 Reimbursement

Claimant seeks reimbursement for the IME performed by Dr. Segal on November 13, 2020 in the amount of \$3,250.00. (Cl. Ex. 9, p. 114) On September 3, 2019, Dr. Gordon, a physician selected by the employer, opined that Mr. Schmit did not have any permanent impairment due to the work injury. (JE2, p. 14) On May 20, 2020, Dr. Gorsche, another physician selected by the employer, opined that claimant sustained 5 percent impairment of the upper extremity. In their post-hearing brief defendant states, “[w]hile claimant may have a valid claim to IME reimbursement under section 85.39 for Dr. Segal’s IME, the same cannot be said of Dr. Manshadi’s IME. (Def. brief, p. 16) I find an evaluation of permanent disability had been made by a physician retained by the employer prior to the time of Dr. Segal’s IME. I further find claimant felt Dr. Segal’s evaluation was too low. I find Mr. Schmit is entitled to reimbursement for the IME performed by Dr. Segal.

Assessment of Costs

Claimant is seeking an assessment of costs against the defendant as set forth in claimant’s exhibit 9. Costs are to be assessed at the discretion of the Workers’ Compensation Commissioner or the deputy hearing the case. I find that claimant was generally not successful in his case and exercise my discretion to not assess costs against the defendant. I exercise my discretion and find that each party shall bear their own costs.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3)(e).

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke’s Hosp. v.

Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(u) or as an unscheduled injury pursuant to the provisions of section 85.34(2)(v). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998).

Based on the above findings of fact, I conclude Mr. Schmit sustained an injury that was contained to his left shoulder. Thus, he is to be compensated on the basis of four hundred weeks pursuant to Iowa Code section 85.34(2)(n).

Iowa Code section 85.34(x) permanent disabilities states:

x. In all cases of permanent partial disability described in paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity, the extent of loss or percentage of permanent impairment *shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American medical association*, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A. Lay testimony or *agency expertise shall not be utilized in determining loss or percentage of permanent impairment* pursuant to paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity.

Iowa Code section 85.34(x) (emphasis added).

This agency has adopted The Guides to the Evaluation of Permanent Impairment, Fifth Edition, published by the American Medical Association for determining the extent of loss or percentage of impairment for permanent partial disabilities. See 876 IAC 2.4.

Based on the above findings of fact, I conclude that Mr. Schmit demonstrated by a preponderance of the evidence that he sustained 5 percent impairment of the left upper extremity. This is based on the ratings of Dr. Gorsche and Dr. Mooney. I reject Dr. Segal's opinions. Thus, Mr. Schmit is entitled to 20 weeks of permanent partial disability benefits commencing on the stipulated date of June 11, 2020.

Claimant has also made a claim for benefits from the Second Injury Fund of Iowa. Section 85.64 governs Second Injury Fund liability. Before liability of the Fund is triggered, three requirements must be met. First, the employee must have lost or lost

the use of a hand, arm, foot, leg, or eye. Second, the employee must sustain a loss or loss of use of another specified member or organ through a compensable injury. Third, permanent disability must exist as to both the initial injury and the second injury.

Mr. Schmit alleged, and the SIF stipulates, that the first qualifying injury is on April 21, 2017 to his bilateral arms. (Hearing Report) He alleges that the second qualifying date of injury is June 3, 2019. Based on the above findings of fact, I conclude that the June 3, 2019 injury only resulted in permanent disability to his left shoulder. I further conclude that the left shoulder is not an enumerated scheduled member under Iowa Code section 85.64. Thus, claimant has failed to demonstrate entitlement to any benefits from the SIF.

We now turn to the issue of his weekly workers' compensation rate. Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. However, any week that does not fairly reflect the employee's customary earnings is excluded. Section 85.36(6). The parties agree that this is the appropriate Code section to determine Mr. Schmit's rate.

The rate dispute in this case centers on which weeks to include in the rate calculation. Claimant set forth his rate calculation in his exhibit 6, page 76 and contends his average weekly wage is \$866.95. Claimant contends certain weeks should be excluded from the rate calculation because he worked fewer than 40 hours during those weeks. Defendant contends it is permissible to include weeks in which claimant worked fewer than 40 hours because they are representative of his customary earnings. Defendant set forth its rate calculation in their exhibit E and contends Mr. Schmit's average weekly wage is \$802.98. In their calculation defendant excludes the weeks ending June 1, 2019 and February 23, 2019. Defendant provides no explanation for these exclusions, but it appears they may have been excluded because defendant felt they were too high due to overtime hours. This agency has held that any week of 40 hours or more is representative regardless of how little or much overtime is worked during that week and regardless of how many hours of overtime are worked during other weeks. See Ratliff v. Quaker Oats Co., File No. 5046704 (January 5, 2017, App. Dec.). I conclude it is appropriate to include the pay periods as set forth in claimant's rate calculation because they are representative of claimant's customary earnings. Thus, I conclude the claimant's rate calculation is correct in this case. I conclude Mr. Schmit's average weekly wage is \$866.95. The parties agree that for rate purposes, Mr. Schmit is married and entitled to two exemptions. Thus, he is entitled to a weekly workers' compensation rate of \$568.57.

Claimant is also seeking an assessment of penalty benefits under Iowa Code section 86.13. If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Custom Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238. There are no weighting guidelines that indicate how each of the factors is to be considered.

First, claimant seeks penalty benefits for the defendant's failure to perform an ongoing investigation into permanency of claimant's alleged ulnar neuropathy and mild traumatic brain injury. Based on the above findings of fact, I conclude Mr. Schmit failed to prove he is entitled to any permanent partial disability benefits beyond the left shoulder injury. Thus, claimant has also failed to prove that the defendant unreasonably delayed or denied any permanency benefits related to claimant's alleged left ulnar neuropathy or alleged mild traumatic brain injury.

Second, claimant seeks penalty for an unreasonable delay or denial of healing period benefits from December 11, 2019 through December 14, 2019. Given the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties, I conclude a penalty in the amount of \$100.00 is appropriate in this case.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for

reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Based on the above findings of fact I conclude claimant is entitled to reimbursement of Dr. Segal's IME in the amount of three thousand two hundred fifty and no/100 dollars (\$3,250.00).

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the rate of five hundred sixty-eight and 57/100 dollars (\$568.57).

Defendant, Tyson Fresh Meats, Inc., shall pay 20 weeks of permanent partial disability benefits commencing on the stipulated commencement date of June 11, 2020.

Defendant, Tyson Fresh Meats, Inc., shall be entitled to credit for all weekly benefits paid to date.

Defendant, Tyson Fresh Meats, Inc., shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.


Defendant, Tyson Fresh Meats, Inc., shall pay penalty benefits in the amount of one hundred and no/100 dollars (\$100.00).

Defendant, Tyson Fresh Meats, Inc., shall reimburse claimant for the IME conducted by Dr. Segal in November 2020 in the amount of three thousand two hundred fifty and no/100 dollars (\$3,250.00).

Each party shall bear their own costs.

Defendant shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1 (2) and 876 IAC 11.7.

Signed and filed this 7th day of October, 2022.


ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Benjamin Roth (via WCES)

Jason Wiltfang (via WCES)

Meredith Cooney (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.